90-1980

No. 90-_____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

TOWERS WORLD AIRWAYS, INC., THE TOWERS ORGANIZATION, INC. and TOWERS FINANCIAL CORPORATION,

*Petitioners*,

—v.—

PHH AVIATION SYSTEMS, INC. and PHH GROUP, INC.,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 25, 1991

## QUESTION PRESENTED

Does the Truth in Lending Act limit the liability of a credit card holder for charges made on the card by a previously authorized user after notice to the card issuer that the card was being used in an unauthorized manner?

## List of Parties

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| | | |
|---|---|---|
| 1) | Petitioners (Plaintiffs-Appellants below): | Towers World Airways Inc., The Towers Organization, Inc., and Towers Financial Corporation. |
| 2) | Respondents (Defendants-Appellees below): | PHH Aviation Systems Inc. and PHH Group, Inc. |

## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i

LIST OF PARTIES . . . . . ii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 2

JURISDICTION . . . . . 2

STATUTES AND REGULATIONS INVOLVED . . . 2

STATEMENT OF THE CASE . . . . . 6

REASONS FOR GRANTING THE WRIT . . . . . 8

CONCLUSION . . . . . 16

APPENDIX

Second Circuit Opinion, *Towers World Airways Inc. et al. v. PHH Aviation Systems Inc. et al.*, dated May 17, 1991 . . . . . 1a

District Court Memorandum Opinion and Order, *Towers World Airways Inc. et al. v. PHH Aviation Systems Inc. et al.*, dated May 30, 1990 . . . . . 13a

Federal Trade Commission Letter, dated March 19, 1980 . . . . . 18a

## TABLE OF AUTHORITIES

**Cases** **Page**

*Cities Serv. Co. v. Pailet*, 452 So.2d 319 (La. Ct. App. 4th Cir. 1984) . . . . . 14

*Martin v. American Express, Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978) . . . . . 15

*Matter of Shell Oil Co.*, 95 F.T.C. 357 (1980) . . . . . 14

*Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842 (Mun. Ct. Akron Co. 1985) . . . . 15

*Walker Bank & Trust Co. v. James*, 672 P.2d 73 (Utah 1983), *cert. denied*, 466 U.S. 937 (1984) . . 15

**Statutes and Regulations**

Truth in Lending Act (15 U.S.C. § 1601 *et seq.* (1988)) . . . . . passim

28 U.S.C. § 1254(1) . . . . . 2

28 U.S.C. § 1291 . . . . . 2

28 U.S.C. § 1332(a)(1) . . . . . 2

**Statutes and Regulations (con't.)** **Page**

Federal Reserve Board Regulation Z
(12 C.F.R. § 226.12) . . . . . passim

Federal Rules of Appellate Procedure
Rule 41(b) . . . . . 2

S. Rep. No. 259, 100th Cong., 2d Sess. 1,
*reprinted in* 1988 U.S. Code Cong. &
Admin. News 3936 . . . . . 8

Act of Oct. 26, 1970, Pub. L. No. 91-508,
tit. V, 84 Stat. 1126, *amending* Truth in
Lending Act of 1970, 15 U.S.C. § 1601-81(t) . . . . 9

**Other Authorities**

Consumer Cred. Guide (CCH) ¶ 3302 (1990) . . . . . 12

R. Rohner, F. Miller, S. Mancuso, *The Law of*
*Truth in Lending*, ¶ 10.03 at 510-18
(Supp. 1989) . . . . . 13

Note, *Credit Cards: Distributing Fraud*
*Loss*, 77 Yale L.J. 1418 (1968) . . . . . 10

Weistart, *Consumer Protection In The Credit*
*Card Industry: Federal Legislative Control*,
70 Mich. L. Rev. 1476 (1972) . . . . . 16

IN THE

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OCTOBER TERM, 1990

**No. 90 -**

TOWERS WORLD AIRWAYS, INC., THE TOWERS ORGANIZATION, INC. and TOWERS FINANCIAL CORPORATION,

*Petitioners,*

— v. —

PHH AVIATION SYSTEMS, INC. and PHH GROUP, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Towers World Airways Inc., The Towers Organization Inc. and Towers Financial Corporation petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The summary judgment Memorandum Endorsement of the district court granting defendants' counterclaim against petitioners (Appendix, *infra* 13a) is unreported. The opinion of the Court of Appeals affirming the judgment of the district court (1a) is not yet reported.

## JURISDICTION

The opinion of the Court of Appeals (1a) was rendered on May 17, 1991. Issuance of the mandate was not stayed, despite petitioners' application under Rule 41(b) of the Federal Rules of Appellate Procedure for such a stay. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was invoked under 28 U.S.C. § 1332(a)(1). Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291.

## STATUTES AND REGULATIONS INVOLVED

Section 1602(o) of the Truth in Lending Act, 15 U.S.C. § 1602(o), provides:

> The term 'unauthorized use' as used in section ... [1643 of this title] ... means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

Section 1643 of the Truth in Lending Act, 15 U.S.C. § 1643, provides:

(a)(1) *Liability of holder of credit card.* A cardholder shall be liable for the unauthorized use of a credit card only if — (A) the card is an accepted credit card; (B) the liability is not in excess of $50; (C) the card issuer gives adequate notice to the cardholder of the potential liability; (D) the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 127(b) or on a separate notice accompanying such statement; (E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise; and (F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

(2) For purposes of this section, a card issuer has been notified when such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information have been taken, whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(b) *Burden of proof.* In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the

> card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a), have been met.
>
> (c) *Liability imposed by other laws or by agreement with issuer.* Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.
>
> (d) *Exclusiveness of liability.* Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

12 C.F.R. § 226.12(b), as promulgated by the Federal Reserve Board, provides:

> (1) *Limitation on amount.* The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.
>
> (2) *Conditions of liability.* A cardholder shall be liable for unauthorized use of a credit card only if:
>
> (i) The credit card is an accepted credit card;

(ii) The card issuer has provided adequate notice* of the cardholder's maximum potential liability and of means by which the card issuer may be notified of loss or theft of the card. The notice shall state that the cardholder's liability shall not exceed $50 (or any lesser amount) and that the cardholder may give oral or written notification, and shall describe a means of notification (for example, a telephone number, an address, or both); and

(iii) The card issuer has provided a means to identify the cardholder on the account or the authorized user of the card.

(3) *Notification to card issuer.* Notification to a card issuer is given when steps have been taken as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information about the loss, theft, or possible unauthorized use of a credit card, regardless of whether any particular officer, employee, or agent of the card issuer does, in fact, receive the information. Notification may be given, at the option of the person giving it, in person, by telephone, or in writing. Notification in writing is considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier.

(4) *Effect of the other applicable law or agreement.* If state law or an agreement between a cardholder and the card issuer

imposes lesser liability than that provided in this paragraph, the lesser liability shall govern.

(5) *Business use of credit cards.* If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, this section does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to this section. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with this section.

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* 'Unauthorized use' means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit.

## STATEMENT OF THE CASE

This case concerns the extent of protection from liability for unauthorized credit card use that the Truth in Lending Act provides to cardholders who have informed card issuers that a card is being used improperly. The Act reflects a clear congressional intent that the risk of loss fall on the card issuer whenever, after notification to the card issuer of the loss, theft, or unauthorized use of a card, unauthorized use occurs, since the issuer is in the best position to develop technological or other means to limit credit card fraud.

Nevertheless, the opinion below carves out an exception to this policy where the unauthorized use is by a formerly authorized user, even when the card issuer has been notified that the user is no longer authorized to use the card. This holding dramatically alters the allocation of risk and responsibility for fraudulent credit card use under the Act. The opinion also precludes a cardholder from limiting its liability by notifying the issuer that a third-party card may be used only in a specified manner.

The card issuer in the case at bar — respondent PHH Aviation Systems Inc. ("PHH") — issued a credit card to petitioner Towers World Airways Inc. ("Towers") to purchase fuel and other aircraft-related goods and services for a corporate jet leased by Towers from PHH. Towers designated Fred Jay Schley as the chief pilot of the leased jet and gave him permission to make purchases with the credit card for Towers' use of the plane. Towers had granted Schley authority to use the credit card for flights by Towers' executives, but not for charters by third parties. Nevertheless, Schley used the credit card to provide service both to Towers' executives and to third parties who chartered flights. Towers disputed the propriety of charges in connection with these chartered flights, and the issuer, respondent PHH, learned of the dispute. Schley incurred $89,025.87 in connection with third party charters prior to the cancellation of the card in August 1988.

PHH claimed the full amount of all charges incurred on the account both before and after it was notified that unauthorized use may have occurred. The District Court granted PHH summary judgment and the Court of Appeals affirmed. The Court of Appeals held that Towers had raised no defense to the issuer's summary judgment motion by

contending that the issuer was on notice that the credit card was being used in an unauthorized manner.

The Court of Appeals reasoned that because the third-party card user was properly in possession of the credit card — Towers had voluntarily entrusted the card to Schley — the cardholder could not avail itself of any of the limitations of liability found in the Truth in Lending Act for unauthorized use, even for use that occurred after the issuer became aware of the claimed unauthorized use. The Act defines "unauthorized use" as use made without "actual, implied or apparent authority." The Court of Appeals reasoned that *any* use of a credit card by a *formerly* authorized user — even use that occurred after the cardholder informed the issuer that the user's authority had been limited or withdrawn — should be deemed to be use made with the "apparent authority" of the cardholder and thus outside the protection of the Act. The Court of Appeals also held that the user's "apparent authority" could not be limited by notification of the limitation to the card issuer.

## REASONS FOR GRANTING THE WRIT

The credit card is an essential part of economic life in modern America. In 1987, some 105.5 million people owned 801.7 million credit and charge cards. The outstanding balances on revolving credit totalled $142 billion as of September 30, 1987.[1] A great proportion of credit cards are issued to more than one user — to spouses, to other family

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1 S. Rep. No. 259, 100th Cong., 2d Sess. 1 (Fair Credit And Charge Card Disclosure Act of 1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News, 3936, 3937.

members, and to employees. These third-party users have no direct contractual relationship with the card issuers. This case involves the allocation of risk for improper credit card use by third-party credit card users who have been given authority to use the card by the cardholder.

All credit card agreements are subject to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and Federal Reserve Board Regulation Z, 12 C.F.R. § 226 *et seq.* Congress adopted the provisions pertaining to credit cards in 1970 in response to widespread concern about the proliferation of credit cards and the reported attempts of some card issuers to hold their customers responsible for charges incurred by thieves or others acting without the cardholder's authorization. One part of the legislative response was to ban the unsolicited issuance of credit cards. Another was the enactment of criminal sanctions for credit card fraud.[2]

However, the most important part of that legislative response was to set explicit limitations on a customer's liability for unauthorized credit card use. Specifically, the Act places a $50 upper limit on the cardholder's liability for unauthorized use. 15 U.S.C. § 1643(a)(1).

The Court of Appeals' decision in the case at hand carves a major exception out of this statutory limit to cardholder liability. It construes the Act so as to totally eliminate the limitations of liability found in the Act for unauthorized charges incurred by spouses, employees, or other users who have been given a card for temporary or limited purposes.

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2 Act of Oct. 26, 1970, Pub. L. No. 91-508, tit. V, 84 Stat. 1126, *amending* Truth in Lending Act, 15 U.S.C. § 1601-81(t) (1970).

In view of conflicting opinions among federal regulatory agencies, state courts and federal courts, this case presents a timely opportunity for the Court to consider and define the limits of liability for unauthorized use of credit cards by persons other than the cardholder.

The Act generally provides that the risk of unauthorized use be placed on the credit card issuer, not the cardholder. 15 U.S.C. § 1643. The Court of Appeals creates a major gap in the congressional policy of protecting the consumer from unauthorized use. Under its opinion, a cardholder cannot trigger the limitations of liability found in the Act by notifying the issuer that the authority of a third-party user to use a card has been limited or terminated.

The Court of Appeals based its limitation of the statutory protection to cardholders in reliance on an intensely factual (and essentially unsupportable) communication difficulty between issuers and merchants of the limitations placed on particular types of card use. It stated that "it is totally unrealistic to burden the card issuer with the obligation to convey to numerous merchants whatever limitations the cardholder has placed on the card user's authority" (11a) (fn. omitted). But most credit card issuers, with dial-in or other on-line computer networks to their merchants, now possess the technological ability to instantaneously convey to merchants the fact that a card has been canceled or otherwise restricted. Indeed Congress intended to place the risk of credit card fraud on issuers in part to encourage the development of this type of technology.[3]

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3 *See* Note, *Credit Cards: Distributing Fraud Loss*, 77 Yale L.J. 1418, 1424-26 (1968).

It is particularly germane that the Federal Reserve Board and the Federal Trade Commission — each of which has regulatory authority under 15 U.S.C. § 1607 to implement the provisions of the Act — and various state courts have taken positions contrary to that taken by the Court of Appeals in this case.[4] As credit card use, and, in particular, third-party credit card use, becomes even more important to the economy, this conflict in interpreting the Truth in Lending Act should be resolved.

A. The Court of Appeals restricted the limitations of cardholder liability for unauthorized card use by third-party users by employing reasoning that is contrary to the thrust of the limitation of liability provisions of the Act and its implementing regulations. In particular, the Court rejected the defense that notice *to the issuer* of unauthorized use was sufficient to make a previously authorized third-party's use of a card unauthorized.

The Court of Appeals reasoned that it is "totally unrealistic to burden the card issuer with the obligation to convey to numerous merchants whatever limitations the cardholder has placed on the card user's authority." (11a).

The Court of Appeals' analysis overlooks the fact that a merchant's lack of knowledge that a particular use is unauthorized has no relevance in determining whether the limitation of liability provisions of the Act apply. For even if a third-party user validly possesses a card and has apparent authority (from a merchant's perspective) to use it, the Act and the regulations explicitly provide that actual notice to the

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4 See Appendix C and cases cited at p. 14-15, *infra*. Other state courts have taken a position similar to that adopted by the Court of Appeals below. *Id.*

issuer that the authority has been terminated precludes imposition of liability upon the cardholder.

In particular, in allocating risk and responsibility for unauthorized use in 15 U.S.C. § 1643(a)(1)(E), Congress has provided that a cardholder may be held liable only if "the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise."

Similarly, Regulation Z limits a cardholder's liability to no more than $50 "before notification *to a card issuer*" that contains "pertinent information about the loss, theft, or possible unauthorized use of a credit card" (emphasis added). 12 C.F.R. § 226.12(b)(1) and (3). The Federal Reserve Board Official Staff Commentary on section 12(b)(3) of Regulation Z states that notice to the card issuer needed to trigger the protection of § 12(b) is "sufficient so long as it gives the 'pertinent information,' which would include the name or card number of the cardholder and an *indication that unauthorized use has or may have occurred*" (emphasis added). 1 Consumer Cred. Guide (CCH), ¶ 3302 (1990). As one commentator has written:

> It might seem self-evident that any continued use of the card is unauthorized once the cardholder so notifies the issuer. One could read the regulation [12 C.F.R. § 226.12(b)(1) and (3)] to mean that once the cardholder notifies the issuer of 'loss, theft, or possible unauthorized use,' this terminates the cardholder's liability for any further use of the card (fn. omitted).

R. Rohner, F. Miller, J. Mancuso, *The Law of Truth in Lending*, ¶ 10.03 (Supp. 1989) at S10-8.

The Court of Appeals may have believed that it was unrealistic to require an issuer to cancel an account (or bear the risk of unauthorized use) once the issuer has been informed that the card user believes a third-party user is engaging in credit card fraud. Under the statutory scheme adopted by Congress and as administered by the regulatory agencies, this concern is misplaced.

Once the issuer receives notice, the Act enjoins the issuer to act promptly and responsibly. If the issuer determines that cancellation of the card is the only feasible means of protecting itself, the issuer may condition continuation of the card's use upon the cardholder's express assumption of the risk of unauthorized use. If the issuer considers that it is too draconian to cancel an entire account in the situation of improper third-party card use, issuers can take technological steps to code individual cards so that only the problematic cards, and not the entire account, are canceled upon notification of improper use. What the issuer cannot do, as PHH did here, is absolutely nothing and then attempt to hold the cardholder liable.

B. The two regulatory agencies with authority to implement the provisions of the Act have taken a position contrary to that of the Court of Appeals — a divergence of view not acknowledged by the Court of Appeals. The Federal Trade Commission, with the concurrence of the staff of the Federal Reserve Board, has explicitly stated that the limitations on cardholder liability found in the Act do extend to use by third-party card users after the issuer has been notified of unauthorized use.

In *Matter of Shell Oil Co.*, 95 F.T.C. 357 (1980), the Commission entered a consent decree requiring a card issuer to limit the liability of a cardholder to $50.00 after receiving notice that the authorized use of the card by a third-party user had been revoked. The proposed consent decree was widely published and commented on by the credit card industry whose views were considered and rejected by the Federal Trade Commission. In a letter from the Commission to the president of the Consumer Bankers Association (18a), the Commission, with the concurrence of the staff of the Federal Reserve Board, wrote:

> With respect to the definition of 'unauthorized use' in Regulation Z, the Commission believes that previously authorized use by a third person becomes 'unauthorized' when the cardholder revokes the authorization and so notifies the card issuer. This position is consistent with the definition of 'unauthorized use' because the third person no longer has apparent authority to use the card after notification of revocation. Notification to the card issuer is sufficient, not only to terminate the third person's apparent authority with respect to the card issuer, but also with respect to merchants that are the agents of the issuer in the use and acceptance of the issuer's credit cards.

C. Various state courts have taken the same position to that adopted by the Federal Trade Commission. For example, in *Cities Serv. Co. v. Pailet*, 452 So.2d 319 (La. Ct. App. 1984), the Louisiana Court of Appeals held that a cardholder was not liable for uses that occurred after the

issuer was notified of possible unauthorized use by the cardholder's employee, even though the employee's prior use had been authorized. *Accord*, *Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842 (Mun. Ct. Akron Co. 1985). Other state courts have taken the opposite view. *Walker Bank & Trust Co. v. Jones*, 672 P.2d 73 (Utah 1983), *cert. denied*, 466 U.S. 937 (1984); *Martin v. American Express, Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978).

D. The Court of Appeals' decision will adversely effect a wide array of consumer interests. For example, the congressional policy of limiting consumer liability for unauthorized use is particularly important to separated and divorced spouses. Frequently the non-cardholder spouse incurs charges on a card after divorce or separation with no intent of paying the cardholder, issuer or merchant for the merchandise or services procured. The card issuer, upon notice, can take precautions preventing this type of fraud from occurring.

The congressional policy limiting cardholder liability for unauthorized use is also important to small businesses, which have cards issued for their employees' use. The Court of Appeals' decision affords the employer no protection for an employee's improper card use. There is no policy or other reason to place the responsibility for unauthorized charges on the employer once it has notified the issuer that card use should be limited or terminated.

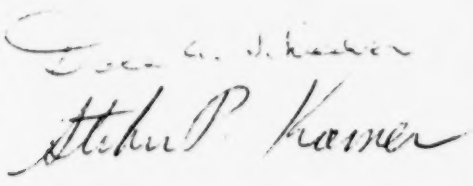
The explicit policy of Congress was to place the risk of fraudulent and unauthorized credit card use upon the issuer since it is the issuer that is most likely to take efficient steps

to minimize fraud and unauthorized use.[5] The industry has responded and taken many such steps. The industry's incentive to make innovations should not be reduced by carving out a wholesale exception to the protection from credit card fraud for usage by once-authorized third party card users.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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June 25, 1991

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5 *See also*, Weistart, *Consumer Protection In The Credit Card Industry: Federal Legislative Control*, 70 Mich. L. Rev. 1476 1509-13 (1972).

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1041—August Term 1990

Argued: February 7, 1991 Decided: May 17, 1991

Docket No. 90-7909

TOWERS WORLD AIRWAYS, INC., THE TOWERS ORGANIZATION, INC. and TOWERS FINANCIAL CORPORATION,

*Plaintiffs-Appellants,*

— v. —

PHH AVIATION SYSTEMS, INC. and PHH GROUP, INC.,

*Defendants-Appellees.*

Before:

LUMBARD, NEWMAN, and ALTIMARI,

*Circuit Judges.*

Appeal from the June 19, 1990, judgment of the District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) requiring credit cardholder to pay credit card issuer for charges incurred by person given credit card, despite defense that use of card was "unauthorized" within

meaning of Truth in Lending Act, 15 U.S.C. § 1643(a) (1988).

Affirmed.

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JAY D. FISCHER, New York, N.Y. (Jeffrey D. Marks, Alexander H. Schmidt, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., on the brief), for *plaintiffs-appellants*.

JAMES P. O'NEILL, New York, N.Y. (Stephenie J. Lannigan, Victor Rivera, Townley & Updike, New York, N.Y., on the brief), *for defendants-appellees*.

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JON O. NEWMAN, *Circuit Judge*:

The Truth-in-Lending Act, 15 U.S.C. § 1643(a) (1988), places a limit of $50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made substantial additional charges on the card. The appeal is brought by Towers World Airways, Inc. ("Towers"), a credit cardholder, and two related corporations from the June 19, 1990, judgment of the District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) denying their request for a declaratory judgment to absolve them of liability

for the sums charged and granting judgment for the card issuer, PHH Aviations Systems ("PHH"), on its counterclaim for the amounts charged. We conclude that the person incurring the charges was not an "unauthorized" user within the meaning of section 1643(a) and therefore affirm.

## Background

In February 1988, PHH issued a credit card to Towers to purchase fuel and other aircraft-related goods and services for a corporate jet leased by Towers from PHH. World Jet Corporation, a subsidiary of United Air Fleet, was responsible for maintaining the aircraft. An officer of Towers designated Fred Jay Schley, an employee of World Jet, as the chief pilot of the leased jet and gave him permission to make purchases with the PHH credit card at least in connection with *non-charter* flights, which were used exclusively by Towers executives. Notwithstanding United Air Fleet's agreement to pay the cost of fuel on chartered flights, which provided service for other clients, Schley used the credit card to charge $89,025.87 to Towers in connection with such flights, prior to the cancellation of the card in August 1988.

Towers filed a complaint in state court seeking a declaratory judgment (i) absolving it of liability for any charges incurred in connection with fuel purchases for chartered flights, (ii) holding PHH responsible for knowingly permitting these purchases and consequently for breaching the credit agreement issued in connection with the PHH credit card, and (iii) requiring an accounting and disgorgement of all improperly charged amounts. After removing to federal court, PHH moved for summary judgment on its counterclaims seeking recovery for the $89,025.97 in unpaid charges.

The District Court granted PHH's motion, denied Towers' prayer for declaratory relief, and entered judgment for the full amount in dispute. Judge Duffy held Towers liable under the terms of the credit agreement between Towers and PHH, which provided that "[the] Aircraft Operator shall be responsible for all purchases made with a Card from the date of its issuance until the Aircraft Operator reports that a card is lost, stolen, misplaced or cancelled by calling PHH." Judge Duffy further held that the Truth-in-Lending Act, which limits a cardholder's liability for "unauthorized" uses, was inapplicable to charges incurred by one to whom the cardholder has "voluntarily and knowingly allow[ed]" access for another, limited purpose.

On appeal, Towers concedes liability under its credit agreement with PHH but contends that summary judgment was improperly granted on the question of whether the Truth-in-Lending Act limits its liability to $50. The issues on appeal are whether Schley's use of the card to incur the $89,025.97 in connection with chartered flights was "unauthorized" within the meaning of the Truth-in-Lending Act and whether that question was properly decided on summary judgment.

## Discussion

Congress enacted the 1970 Amendments to the Truth-in-Lending Act, 15 U.S.C. §§ 1602(j)-(o), 1642-44 (1988), in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. In addition to imposing criminal sanctions for the most egregious cases, those involving fraud, 15 U.S.C. § 1644 (1988), the amendments enacted a scheme for limiting the liability of cardholders for all charges by

third parties made without "actual, implied or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643 (1988). Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of $50 for the amount charged on the card, if certain conditions are satisfied.[1] 15 U.S.C. § 1643(a)(1)(B) (1988); *Credit Card Service Corp. v. FTC*, 495 F.2d 1004, 1006 (D.C. Cir. 1974). Except as provided in section 1643, "a cardholder incurs no liability from the unauthorized use of a credit card." 15 U.S.C. § 1643(d).

By defining "unauthorized use" as that lacking in "actual, implied, or apparent authority," Congress apparently contemplated, and courts have accepted, primary reliance on background principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. *See, e.g., Fifth Third Bank/VISA v. Gilbert*, 17

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1 15 U.S.C. § 1643(a)(1) (1988) provides:

> A cardholder shall be liable for the unauthorized use of a credit card only if —
> (A) the card is an accepted credit card;
> (B) the liability is not in excess of $50;
> (C) the card issuer gives adequate notice to the cardholder of the potential liability;
> (D) the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 1637(b) of this title or on a separate notice accompanying such statement;
> (E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise; and
> (F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

Ohio Misc. 2d 14, 478 N.E.2d 1324, 1326 (1984); *Walker Bank & Trust Co. v. Jones*, 672 P.2d 73, 75-76 (Utah 1983), *cert. denied*, 466 U.S. 937 (1984); *see also* 12 C.F.R. § 266.12 n.22 (1990). Under the parameters established by Congress, the inquiry into "unauthorized use" properly focuses on whether the user acted as the cardholder's agent in incurring the debt in dispute. A cardholder, as principal, can create express and implied authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See Restatement (Second) of Agency* § 7 (1958).

In the pending case, there remains an unresolved issue of fact as to whether Steven Hoffenberg, the Towers officer who dealt with Schley, expressly or impliedly authorized Schley to purchase fuel on *chartered* flights. Hoffenberg's testimony that he instructed Schley to limit his use of the card to purchases "benefit[ting] . . . Towers' use of the airplance" supports the inference that Schley lacked both express and implied authority to make the disputed purchases. Whether Schley's testimony to the contrary should be credited can be resolved only by a factfinder. Accordingly, we cannot affirm the grant of summary judgment on the theory that Schley possessed express or implied authority.

A. Did the Card User Have Apparent Authority?

Unlike express or implied authority, however, apparent authority exists entirely apart from the principal's manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or conduct that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card user acts with the cardholder's consent. *See Restatement (Second) of Agency* §§ 8, 27 (1958). Though a cardholder's

relinquishment of possession may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder's consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970 Amendments demonstrates Congress's intent that the category of cases involving charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under sections 1602(o) and 1643. The description in section 1643 of the conditions precedent to an issuer's recovery of up to $50 from the cardholder for unauthorized uses clearly assumes that cases of loss or theft fall within the definition of unauthorized uses, *see* 15 U.S.C. § 1643(a)(1)(D) (1988) (requiring that "the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card"); *id.* § 1643(a)(1)(E) (unauthorized use must occur before the "card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise"), while section 1644's imposition of criminal penalties for "[f]raudulent use of credit cards" makes a similar assumption with respect to fraudulently induced transfers, *id.* § 1644 (1988).

Because the statute provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in section 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of express or

implied authority for the additional charges, several state courts have adopted the analysis of the Court of Civil Appeals of Alabama in *Martin v. American Express, Inc.*, 361 So. 2d 597, 600 (Ala. Civ. App. 1978), and declined to apply the Truth-in-Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges. *See Cities Service Co. v. Pallet*, 452 So. 2d 319, 321-22 (La. Ct. App. 1984); *Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842, 843-44 (1985); *Michigan National Bank v. Olson*, 44 Wash. App. 898, 723 P.2d 438, 441 (1986); *Mastercard v. Town of Newport*, 133 Wis. 2d 328, 396 N.W.2d 345, 348 (Wis. App. 1986).

Though we agree that a cardholder, in lending or giving his card for one purpose, acts in a way that significantly contributes to the appearance of authority, at least as perceived by the third-party merchant, to make other purchases, we need not decide whether voluntary relinquishment for one purpose creates in every case apparent authority to incur other charges. In the pending case, the appearance of authority for Schley to purchase fuel on chartered flights was established not only by Towers' consent to Schley's unrestricted access to the PHH card but by other conduct and circumstances as well.

Nothing about the PHH card or the circumstances surrounding the purchases gave fuel sellers reason to distinguish the clearly authorized fuel purchases made in connection with non-charter flights from the purchases for chartered flights. It was the industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Schley as the pilot and subsequently giving him the card, Towers thereby imbued

him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with Towers' blessing Schley had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between these uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Schley lacked authority for the charter flight purchases.

B. Was Apparent Authority Limited by Notice to the Card Issuer?

Towers contends that, despite its own failure to have the card cancelled, once PHH, as the card issuer, learned, either through Towers or a third party, that Schley lacked authority to make certain charges, any such transaction that Schley entered into becomes an unauthorized use even if fuel sellers reasonably perceived that Schley had apparent authority to charge fuel purchases. Whether notifying the card issuer that some uses (or users) of a card are unauthorized makes them so has divided those courts that have considered the issue. *Compare Cities Service Co.*, 452 So. 2d at 320-22 (authority terminated), *and Standard Oil Co.*, 489 N.E.2d at 844 (same), *with Martin*, 361 So. 2d at 600-01 (notice to card issuer ineffective), *and Walker Bank*, 672 P.2d at 75 (same).

With respect to this claim as well, the agency principles incorporated in section 1602(o) remains Congress's chosen vehicle for establishing a card bearer's authority, and whether a cardholder can limit a card bearer's authority by notifying the card issuer must be resolved by looking first to these principles and then to other indicia of Congressional intent that might qualify the application of agency principles to

credit card transactions. Under well-established principles of agency law, codified in *Restatement (Second) of Agency* § 166 (1958), notice to a third party of limitations on an agent's authority qualifies the agent's apparent authority to act on the principal's behalf. *See Warner v. Central Trust Co.*, 798 F.2d 167, 171 (6th Cir. 1986); *Cox v. Pabst Brewing Co.*, 128 F.2d 468, 472 (10th Cir. 1942); H. Reuschlein & W. Gregory, *Agency and Partnership* 164 (1979). However, in making a purchase with a third-party credit card, where the card issuer and the selling merchant are distinct entities, a card bearer not only reaches an agreement with one third party, the merchant, but also indirectly deals with a different third party, the card issuer. Use of a third-party credit card by its bearer is made possible by arrangements, previously entered into by both the merchant and the card issuer, that simultaneously obligate the cardholder and the issuer to the merchant and the cardholder to the card issuer each time the card is used to charge purchases.[2]

The rule of agency law contained in section 166 of the *Restatement* would permit the principal to qualify the authority of an agent to make purchases from a merchant by giving the merchant notice of the limitation. The limitation would surely be effective in an ordinary three-party arrangement in which an agent charges purchases on a

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2 As compared to the other set of third parties, the selling merchants, PHH would have been aware of different facts bearing on Schley's authority, not all of which could be attributed to Towers as the principal. Towers has not questioned and we therefore need not decide whether an issuer seeking recovery for credit card charges under a theory of apparent authority must establish that it, as well as the merchant, reasonably believed the agent to have apparent authority.

principal's running account with a merchant. It is more doubtful whether a principal can similarly avoid liability by notifying the merchant of limitations on an agent's authority when an agent makes purchases using a credit card. Both cardholders and merchants normally regard anyone voluntarily entrusted with a credit card as having the right to make any purchases within the card's contractually specified limits. But to whatever extent a cardholder can limit the authority of a card user by giving notice to a merchant, we do not believe he can accomplish a similar limitation by giving notice to a card issuer. In four-party arrangements of this sort, it is totally unrealistic to burden the card issuer with the obligation to convey to numerous merchants whatever limitations the cardholder has placed on the card user's authority.[3]

Finally, there is no substance to the argument that our construction of the 1970 Amendments inadequately protects cardholders against liability for charges made without their consent. Admittedly, third-party credit cards ordinarily permit the bearer to charge purchases made from a vast number of merchants, and cardholders, who typically do not know which merchants have contracted to accept the card, cannot contact each merchant to selectively revoke a card bearer's authority. However, a cardholder need not do so to prevent unauthorized use by one entrusted with the card. In many cases, the cardholder can avoid unwanted charges

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3 As framed by the *Restatement*, the notice rule is subject to certain restrictions, such as the requirement that the principal's communication of the limits on the agent's authority must be clear. But the existence of these restrictions does not necessarily mean that the notice rule itself is applicable in all contexts where those restrictions are satisfied. *See Restatement of Agency (Second)* at § 166, comment e.

simply by repossessing the card. Where a card issuer permits a cardholder to cancel the card, and thereby any contractual obligation to pay, a cardholder can limit his liability even if unable to regain possession by cancelling his card. Even where the card issuer also requires return of the card prior to cancellation of the agreement, a cardholder who has tried and failed to recover a card from an "estranged spouse, a dishonest employee, or a disappeared 'friend,'" R.J. Rohner, F.H. Miller, J.H. Mancuso, *The Law of Truth-in-Lending* ¶ 10.03[2][a], at S10-9 (Supp. 1989), likely can prevail on the claim that the card user has stolen the card and that any subsequent charges are for that reason unauthorized. Finally, we note that by foreclosing card issuers from recovering unauthorized charges from cardholders, section 1643(a)(1) undoubtedly encourages card issuers to facilitate the cancellation of cards once a possible unauthorized use has been reported.

Because the disputed charges were not unauthorized within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1), PHH was entitled to recover their full value from Towers under their credit agreement.

The judgment of the District Court is affirmed.

**ENDORSEMENT**

Towers World Airways, Inc., The Towers Organization, Inc. and Towers Financial Corporation, *Plaintiffs*, v. PHH Aviation Systems, Inc., *Defendants*, and PHH Group, Inc. 88 Civ. 7303 (S.D.N.Y.)

Defendants PHH Aviation Systems, Inc. ("AvSystems") and PHH Group, Inc. ("PHH") bring this motion for summary judgment on their counterclaim, pursuant to Fed. R. Civ. P. 56(c), against plaintiffs Towers Financial Corporation ("Towers Financial") and Towers World Airways, Inc. ("Towers Airways"), (or together ("Towers"), alleging Towers failed to repay credit extended by PHH to Towers. PHH seeks repayment in the amount of $89,025.87 plus interest. Towers also seeks a declaratory judgment that no monies are owed and that PHH was unjustly enriched in amounts Towers already paid PHH.

In 1988, Towers leased an Aircraft from PHH. Sometime thereafter, AvSystems, PHH's credit account managers, issued a PHH credit card jointly to Towers Airways and Towers Financial for the purchase of aviation fuel and other goods and maintenance services in connection with the Aircraft. LaRosa Affid. ¶¶ 4-7. The PHH credit card was then sent to World Jet Corporation ("World Jet"), a subsidiary of United Air Fleet, Inc. ("UAF"), a company designated to maintain and oversee the Aircraft. World Jet then presented the PHH credit card to Fred Jay Schley, its employee, who had been designated as Chief pilot for the Aircraft by Steven Hoffenberg, Towers Financial's President and Chairman of the Board. Schley Depo. at 11. Authorization was extended by Hoffenberg to Schley, on

behalf of World Jet and UAF, for use of the PHH credit card in connection with and for the benefit of the Aircraft on non-charter flights, pursuant to a Towers-UAF agreement.

Specifically, the Towers' management agreement with UAF permitted UAF to charter the Aircraft for use by third persons when the plane was not being used for the transportation of Towers' executives. The agreement provided that the Aircraft was to be chartered "dry," which apparently meant that fuel costs for charter flights were to be borne by UAF rather than Towers. Hoffenberg Depo. at 22-23, 27-28. Schley, a UAF pilot, evidently used the PHH credit card to purchase fuel and other services for the Aircraft on chartered flights, in direct contravention of the Towers' management agreement with UAF. By August 1988, before the PHH credit line with Towers was terminated, Schley charged $89,025.87 in unauthorized fuel costs. Hoffenberg Depo. at 47-49; O'Neil Affid. ¶ 3. Towers claims that it cannot be held accountable for Schley's charges because such charges were prohibited by Towers' internal company policy and Schley knew that use of the PHH card in connection with charter flights was unauthorized. Because Schley purportedly used the credit card while outside the scope of his employment with Towers, Towers argues that it is thus not liable for amounts still due and owing, traceable to Schley's allegedly private use.

I find otherwise. Towers knew or should have known of the express conditions and terms for use of the PHH credit card. In order to use the credit card, Towers, and by extension its employees, agreed to be bound by certain terms and conditions including that:

> [the] Aircraft Operator shall be responsible for all purchases made with a Card from the date

> of its issuance until the Aircraft Operator reports that a Card is lost, stolen, misplaced or cancelled by calling PHH.

LaRosa Affid., Exh. A.

Schley, as the Aircraft's pilot, was given by Towers unfettered access and use of the PHH credit card. Absent Hoffenberg having reported either that the card was stolen or used in contravention of the agreement, PHH is not chargeable with knowledge of any unauthorized use of its card. Furthermore, by the clear language of the agreement, Towers agreed to be responsible for fuel charged to PHH by one of its authorized employees, unless the card was reported lost, stolen, misplaced, or cancelled.

It is of no moment that Schley was not actually authorized to charge fuel on chartered flights. Schley's daily trip sheets did or should have provided ample notification to Towers that Schley was inappropriately charging charter flights to Towers' PHH credit line and that Hoffenberg was obligated to sever Schley's use of the card. Neither Hoffenberg nor Towers notified PHH of Schley's unauthorized credit card use before Schley incurred, over several months, almost $90,000 in fuel charges. Indeed, Schley's unauthorized use was brought to light in August, 1988, well after Schley charged significant amounts on the PHH credit card. *Allied Stores of New York, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. Civ. Ct. 1967) (authorizing agent of the credit card assumes risk of loss for theft or unauthorized use after receipt of notice of the theft or unauthorized use). And although Hoffenberg claims to have paid the charges "with reservation," purportedly indicating concern over Schley's possible unauthorized use of the PHH credit card, I find that

such did not provide notice to PHH that Schley was abusing his privileged use of the PHH credit card.

In business and commerce, holders and issuers of credit cards are protected from sustaining losses occasioned by improper use of such cards. Assumption of liability, however, is on the cardholder who, voluntarily and knowingly allowing another to abuse the privileges attendant to its use, was in the best position to have foreseen losses sustained the cardholder by foreseen misuses by the agent. *Id.*; *see Martin v. American Express, Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978); *see also TransAmerica Ins. Co. v. Standard Oil Co.*, 325 N.W.2d 210 (N.D. 1982) (cardholder is charged with its own negligence in paying for charges while failing to adequately examine statements such that it could rectify a fraudulent misuse of employer's credit by an employee entrusted with the card). Because the PHH credit card was entrusted to Schley by Towers, the cardholder, Schley overused the PHH card for six months, and Towers paid Schley's charges during a six-month period that Schley was alleged to have abused his privilege in overusing the PHH credit card, Towers was in the best position to have discovered the misuse. Losses sustained pursuant to Schley's overuse of the PHH credit card must therefore be sustained by Towers. *See Compania Anomima Venezolana De Navegacion v. American Express International Banking Corp.*, No. 84 Civ. 2047 (S.D.N.Y. July 12, 1985)(damages for loss must be borne by bank customer who was in "best position to prevent such losses, by avoiding last minute transfers, by confirming receipt of the intended funds or by purchasing insurance) (citing *Kerr Steamship Co. v. Radio Corp. of America*, 245 N.Y. 284, 291-92, *cert. denied*, 275 U.S. 557 (1927) (Cardozo, J.).

For the foregoing reasons, summary judgment is granted the defendants, plaintiffs prayer for declaratory relief is denied, and the complaint is dismissed. Defendants are hereby directed to submit judgment on 5 days notice within 10 days of the date of this order.

SO ORDERED.
DATED: New York, New York
May 30, 1990

/signed/
Kevin Thomas Duffy, U.S.D.J.

[Letterhead of Federal Trade Commission]

March 19, 1980

Mr. Leslie R. Butler, President
The Consumer Bankers Association
1725 K Street, N.W.
Washington, D.C. 20006

Re: Shell Oil Company
File No.: 792-3260

Dear Mr. Butler:

Thank you for your recent letter commenting on the Federal Trade Commission's consent order in the *Shell Oil* proceeding. Your letter was placed on the public record pursuant to Section 2.34 of the Commission's Rules and was given serious consideration. After carefully evaluating all the comments received, including yours, the Commission has decided to issue the order contained in the agreement. The following is a reply to the points you raised in your letter.

With respect to the definition of "unauthorized use" in Regulation Z, the Commission believes that previously authorized use by a third person becomes "unauthorized"

when the cardholder revokes the authorization and so notifies the card issuer. This position is consistent with the definition of "unauthorized use" because the third person no longer has apparent authority to use the card after notification of revocation. Notification to the card issuer is sufficient, not only to terminate the third-person's apparent authority with respect to the card issuer, but also with respect to merchants that are the agents of the issuer in the use and acceptance of the issuer's credit cards. This position is consistent with the statutory theory of Regulation Z, as shown by § 226.13(e), that notice to the issuer is also notice to the issuer's agents for purposes of the safeguards set forth in § 226.13.

The case of *Martin v. American Express*, Inc., 361 So.2d 597 (Ala. Civ. App. 1978), cited in your comment, involved a different factual situation from the facts alleged in the *Shell* complaint. In *Martin* there was not an absolute revocation but instead an attempt by the cardholder to set a maximum limit on the holder's liability for third-party use. Without either implying concurrence or disagreement with the *Martin* holding, the Commission notes that the facts in that case are different from the unconditional and complete revocation as alleged in *Shell*.

Your letter states that this order, if generally followed in the credit card industry, would place too great a burden on the credit card issuer as opposed to the cardholder. Congress through the Truth in Lending Act and Regulation Z has made a public policy determination that, after notification to the issuer of loss, theft, or other unauthorized use, the risk of loss for the third-party use is placed on the issuer. After notification it is the responsibility of the issuer to take whatever steps it deems appropriate to minimize or eliminate any loss. As shown by this order, The Commission interprets Regulation Z to place this burden after notification

on the credit card company rather than on the cardholder regardless of whether the unauthorized use was a result of loss, theft, or revocation of previously-authorized use.

It is in the public interest that the cardholder be relieved of liability for third-party use after notification to the issuer of revocation of previously-authorized use rather than to continue to hold the cardholder liable until the card is returned to the issuer. In many instances, as with lost or stolen cards, it may be impractical or impossible for the holder to retrieve the card and return it to the issuer, and continuing to hold the cardholder liable would subject the holder to possibly unlimited charges by the third person that the holder is powerless to control. The card issuer, on the other hand, can protect itself through merchant notification and other loss-prevention measures. Further, the order specifically does not aid the cardholder if the cardholder has committed fraud or received benefit from the third-person use, thus protecting the card issuer from unscrupulous holders. Finally, nothing in this order prohibits the issuer from attempting to hold the third party liable for these charges.

Finally, you suggest that consideration of this order be deferred until a formal Federal Reserve Board interpretation can be obtained. However, this matter was referred to the Commission from the Board staff, and the Commission has been informed by Board staff that the Commission's legal interpretations of this matter is correct. Thus, the Commission believes that nothing would be gained by such a delay for formal interpretation.

Your other points raised in your comment have been considered. However, for the reasons stated in this letter, the

Commission believes this order is appropriate and is based upon a correct interpretation of Regulation Z.

In sum, the Commission has decided that it is in the public interest to issue the agreed-upon order.

Your interest in bringing your comments to the attention of the Commission is appreciated.

By direction of the Commission.

/signed/
Carol M. Thomas
Secretary

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1980

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

TOWERS WORLD AIRWAYS INC.,
THE TOWERS ORGANIZATION, INC. and
TOWERS FINANCIAL CORPORATION,

*Petitioners,*

vs.

PHH AVIATION SYSTEMS, INC. and
PHH GROUP, INC.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Where a cardholder voluntarily entrusts its credit card to its agent and fails to notify the issuer of the risk of potential unauthorized use of the card, is that cardholder's liability limited under the Truth-In-Lending Act?

2. Assuming, *arguendo*, that the credit card issuer had notice of the agent's limited authority, should the cardholder be held liable for charges which exceeded the agent's authority where the third party merchant involved was unaware of the agent's limited authority?

## STATEMENT PURSUANT TO RULE 29.1 OF THE UNITED STATES SUPREME COURT

Petitioner PHH Aviation Systems, Inc. is a wholly owned subsidiary of PHH Holdings Corporation which is, in turn, a wholly owned subsidiary of PHH Corporation. On or about August 22, 1988, the name of PHH Group, Inc. was changed to PHH Corporation. PHH Holdings Corporation owns a number of other corporations engaged in various activities throughout the world which have no relationship with PHH Aviation Systems, Inc. other than their common ownership by PHH Holdings Corporation. PHH Corporation will provide a list of such entities, if requested.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| STATEMENT PURSUANT TO RULE 29.1 OF THE UNITED STATES SUPREME COURT | ii |
| TABLE OF AUTHORITIES | v |
| COUNTERSTATEMENT OF FACTS | 2 |
| REASONS FOR DENYING THE WRIT | 4 |
| A. The Court of Appeals' Decision Does Not Decide An Important Question of Federal Law and Will Not Adversely Affect A Wide Array of Consumer Interests | 4 |
| B. The Allegedly Conflicting Precedents Cited By Petitioners Represent Neither The Opinions of Conflicting Circuit Courts Nor State Courts of Last Resort, Thus A Writ of Certiorari Is Not Appropriate | 7 |
| C. The Record Does Not Establish That Notice Was Given To PHH By Towers That Unauthorized Use of the PHH Credit Card By An Agent Might Occur | 8 |
| CONCLUSION | 9 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Cities Serv. Co. v. Pailet*, 452 So.2d 319 (La. Ct. App. 4th Cir. 1984) | 7, 8 |
| *Matter of Shell Oil Co.*, 95 F.T.C. 357 (1980) | 8 |
| *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70 (1955) | 4 |
| *Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842 (Mun. Ct. Akron Co. 1985) | 8 |
| **Statutes, Regulations and Rules** | |
| Truth-In-Lending Act, 15 U.S.C. §1601 et seq. (1988) | 4 |
| Federal Reserve Board Regulation Z (12 C.F.R. § 226.12) | 7 |
| U.S. Sup. Ct. R. 10.1(b), 28 U.S.C.A. | 7 |
| U.S. Sup. Ct. R. 10.1(c), 28 U.S.C.A. | 4 |
| **Other Authorities** | |
| *16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure* § 4004, at 507 (1977) | 7 |

No. 90-1980

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

PHH Aviation Systems, Inc. and PHH Group, Inc. (collectively "PHH") submit this brief in opposition to the petition of Towers World Airways, Inc., The Towers Organization and Towers Financial Corporation (collectively "Towers") for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

## COUNTERSTATEMENT OF FACTS

Although petitioners' brief seeks to characterize this case as a critical Truth-In-Lending Act precedent, this characterization is misleading. Quite simply, this case arises from a commercial dispute, wherein a corporation seeks to avoid paying $89,025.87 charged to its corporate charge card by its agent to whom it voluntarily entrusted its card.

In February 1988, PHH Aviation Systems ("AvSystems") issued a credit card for the purchase of aviation fuel and other goods and services (the "PHH Credit Card") to Towers Airways and Towers Financial Corporation ("TFC"). (Petitioners' Appendix ("App.") at 3a.) Pursuant to the instruction of an officer of Towers Airways, the PHH Credit Card was delivered to World Jet Corporation ("World Jet"), the company responsible for the management of the aircraft that TFC had leased for its use (the "Aircraft"). (App. at 13a.) Upon receiving the PHH Credit Card, World Jet presented it to Fred Jay Schley, who had been designated as chief pilot for the aircraft by Steven Hoffenberg, Chairman of the Board and President of TFC. (App. at 13a.)

From mid-February to mid-August 1988, purchases totalling $265,806.65 were made on the card by Schley and other pilots of the Aircraft for the benefit of the Aircraft; payments totalling $176,780.78 were received with respect to these purchases. These payments were made pursuant to detailed weekly billing statements which were provided to TFC by AvSystems. In all, these payments covered 92 separate PHH Credit Card transactions which were detailed on 15 weekly AvSystems billing statements dated March 9, 1988 through June 22, 1988. Although due demand was made on several occasions for the balance due of $89,025.87, that amount was never paid by petitioners.

On or about August 12, 1988, after making several demands for payment, AvSystems cancelled the PHH Credit Card and closed petitioners' account. Later, by letter dated August 24, 1988, petitioners first notified AvSystems in writing of an alleged misuse of the PHH Credit Card. Shortly thereafter, in September 1988, petitioners initiated legal proceedings against AvSystems and PHH Group, Inc.

Towers filed a complaint in the New York state court seeking a declaratory judgment (i) absolving it of liability for any charges incurred in connection with fuel purchases for chartered flights for individuals unconnected with TFC, (ii) holding PHH responsible for knowingly permitting these purchases and consequently for breaching the credit agreement issued in connection with the PHH Credit Card, and (iii) requiring an accounting and disgorgement of all improperly charged amounts. After removing to federal court, PHH moved for summary judgment on its counterclaims seeking recovery of the $89,025.97 in unpaid charges. (App. at 3a.)

The District Court granted PHH's motion, denied Towers' prayer for declaratory relief, and entered judgment for the full amount in dispute. District Judge Kevin T. Duffy held Towers liable under the terms of the credit agreement between Towers and PHH, which provided that "[t]he Aircraft Operator shall be responsible for all purchases made with a Card from the date of its issuance until the Aircraft Operator reports that a card is lost, stolen, misplaced or cancelled by calling PHH." Judge Duffy further held that the Truth-In-Lending Act, which limits cardholder's liability for "unauthorized" uses, was inapplicable to charges incurred by one to whom the cardholder has "voluntarily and knowingly allow[ed]" access for another, limited purpose. (App. at 4a.)

Towers appealed the District Court's decision, conceding liability under its credit agreement with PHH but contending that summary judgment was improperly granted on the issue of whether the chief pilot's use of the card to incur charges totalling $89,025.87 in connection with chartered flights was "unauthorized" within the meaning of the Truth-In-Lending Act. (App. at 4a.) On May 17, 1991, the United States Court of Appeals for the Second Circuit affirmed the District Court's holding that the disputed charges were not unauthorized within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1) because, under the facts of this case, the chief pilot in possession of the PHH credit card had apparent authority to use the PHH credit card for all purchases. (App. at 8a-9a.)

## REASONS FOR DENYING THE WRIT

Petitioners have failed to identify any conflict among the circuits or any conflict between the Second Circuit's opinion herein and *any* State Court of last resort. In addition, despite petitioners' claim to the contrary, the Second Circuit has not carved out a "major exception" to the $50 statutory limit to cardholder liability set forth in the Truth-In-Lending Act, 15 U.S.C. §1601 et seq. (1988) To the contrary, the Second Circuit explicitly held that under the facts of this case the Truth-In-Lending Act "provides no guidance as to uses arising from the voluntary transfer of credit cards" and resolved the issue of Towers' liability based upon principles of agency law. (App. at 7a.) In support of this resolution, the Second Circuit observed that:

> [b]y defining 'unauthorized use' as that lacking in 'actual, implied or apparent authority,' Congress apparently contemplated, and courts have accepted, primary reliance on background principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. (Citation omitted) (App. at 5a.)

Petitioners advance four separate reasons why their petition for a writ of certiorari should be granted. These reasons are not only insufficient to warrant this Court's granting a writ of certiorari but they are also misleading in that they assume facts not established below.

### A. *The Court of Appeals' Decision Does Not Decide An Important Question of Federal Law and Will Not Adversely Affect A Wide Array of Consumer Interests*

U.S. Sup. Ct. R. 10.1(c) provides that a writ of certiorari may be granted where an "important question of federal law," not previously decided by this Court has been decided by a U.S. Court of Appeals. Importance in this context is measured in terms of importance to the general public, and frequently involves issues of constitutional dimensions. *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). Clearly,

this case does not rise to such a level of importance. Despite petitioners' attempt to magnify the precedential value of this case, it must be viewed as what it is — a case arising from a commercial dispute. Limited to its facts, as indeed it must be, this case stands for the simple proposition that where a cardholder voluntarily entrusts its credit card to an agent and where there is no objective evidence of any limitation upon that agent's authority to use the credit card, the cardholder is responsible for charges made to the card.

The Second Circuit itself recognized the limited application of its holding in this case and wrote:

> Though we agree that a cardholder, in lending or giving his card for one purpose, acts in a way that significantly contributes to the appearance of authority, at least as perceived by the third-party merchant, to make other purchases, we need not decide whether voluntary relinquishment for one purpose creates in every case apparent authority to incur other charges. In the pending case, the appearance of authority for Schley to purchase fuel on chartered flights was established not only by Towers' consent to Schley's unrestricted access to the PHH card but by other conduct and circumstances as well. (App. at 8a.)

The Second Circuit then proceeded to examine the facts which led them to conclude that apparent authority was not limited in this case:

> Nothing about the PHH card or the circumstances surrounding the purchases gave fuel sellers reason to distinguish the clearly authorized fuel purchases made in connection with non-charter flights from the purchases for chartered flights. It was the industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Schley as the pilot and subsequently giving him the card, Towers thereby imbued him with more apparent

> authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with Towers' blessing Schley had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between these uses expressly authorized and those now claimed to be unauthorized – the identity of the passengers – was insufficient to provide notice to those who sold the fuel that Schley lacked authority for the charter flight purchases. (App. at 8a-9a.)

The Second Circuit's fact specific decision doesn't affect the consumers right to limit their liability *vis a vis* cards voluntarily entrusted to a third-party by simply cancelling the card in question. The Second Circuit deliberately left open the possibility that the apparent authority created by voluntary credit card entrustment might be terminated by subsequent conduct.

Petitioner contends that "the congressional policy of limiting consumer liability for unauthorized use is particularly important to separated and divorced spouses." (Petitioner's Brief at 15). The Second Circuit recognized this and specifically observed:

> Even where the card issuer also requires return of the card prior to cancellation of the agreement, a cardholder who has tried and failed to recover a card from an 'estranged spouse, a dishonest employee or a disappeared "friend," ' (citation omitted), likely can prevail on a claim that the card user has stolen the card and that any subsequent charges are for that reason unauthorized. (App. at 2a.)

While the issue of unauthorized use of credit cards by estranged spouses may need to be explored in greater depth, this case, which has no factual connection to the issue, is not the vehicle for such exploration.

B. *The Allegedly Conflicting Precedents Cited By Petitioners Represent Neither The Opinions of Conflicting Circuit Courts Nor State Courts of Last Resort, Thus A Writ of Certiorari Is Not Appropriate*

As clearly set forth in U.S. Sup. Ct. R. 10, certiorari is "not a matter of right, but of judicial discretion," and "will be granted only where there are special and important reasons therefor." *See also* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4004, at 507 (1977).

In their brief, petitioners point to the purported conflict between the Second Circuit's May 17, 1991 decision herein and (i) Federal Reserve Board Regulation Z (12 C.F.R. §226.12 ("Regulation Z")); (ii) a Federal Trade Commission ("FTC") consent order; (iii) an Ohio *municipal court* decision and (iv) a Louisiana *Court of Appeal* decision. Since neither the Ohio municipal court nor the Court of Appeal of Louisiana is a state court of last resort, *none* of these "conflicting decisions" represent a decision otherwise final in the absence of Supreme Court review. The Second Circuit's decision thus has raised no conflict which warrants this Court's granting certiorari. *See* U.S. Sup. Ct. R. 10.1(b), 28 U.S.C.A.

The holding in the Louisiana case cited by petitioners, *Cities Serv. Co. v. Pailet*, 452 So. 2d 319 (La. Ct. App. 4th Cir. 1984), is, in fact, not in conflict with the decision by the Second Circuit herein. Although the Louisiana Court of Appeal held that the cardholder was not liable for charges made to his card after the issuer had received notice of possible unauthorized use of the card, it also held that the cardholder was liable for charges made to the card before such notice was given to the issuer. Accordingly, based upon Judge Duffy's finding that notice was not given to PHH until August 1988, *Cities Service* actually supports the Second Circuit's finding that Towers is liable for the charges in question.

C. *The Record Does Not Establish That Notice Was Given To PHH By Towers That Unauthorized Use of the PHH Credit Card By An Agent Might Occur*

In framing its Question Presented, Towers assumes a fact not established in the instant case — i.e. that notice of unauthorized use was given to PHH prior to its alleged misuse.

In his Endorsement Order, Judge Kevin T. Duffy explicitly observed that "(the) unauthorized use was brought to light in August, 1988, well after (the agent) charged significant amounts on the PHH Credit Card." (App. at 15a.)

Based upon these facts, the decision below simply does not conflict with Regulation Z or *Matter of Shell Oil Co.*, 95 F.T.C. 357 (1980), the FTC consent decree which required that a card issuer limit the liability of a cardholder to $50 after receiving notice that the authorized use of the card by a third-party user had been revoked. Similarly, the state court decisions cited by petitioners, *Cities Serv. Co. v. Pailet*, 452 So.2d 319 (La. Ct. App. 4th Cir. 1984) and *Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842 (Mun. Ct. Akron Co. 1985) have no applicability to this case.

In short, not only have petitioners failed to demonstrate that a conflict exists among the Circuits or that an important federal question has been raised below, but they have also made an erroneous assumption of a critical fact. There simply is no basis for a grant of certiorari in this case.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

July 25, 1991

Respectfully submitted,

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